Supreme Court, U.S.
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No. 96-908

In the Supreme Court of the United States

OCTOBER TERM, 1996

FORT STEWART ASSOCIATION OF EDUCATORS,
PETITIONER

v.

JOSEPH A. WESTON AND
FORT STEWART DEPENDENT SCHOOLS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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12 pp

QUESTION PRESENTED

Whether the district court properly dismissed petitioner's complaint seeking to compel arbitration of an employment dispute where neither the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111, nor any other applicable statutory personnel scheme authorizes such district court review.

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OPINIONS BELOW

The per curiam order of the court of appeals (Pet. App. 1a-2a) is unpublished, but the judgment is noted at 87 F.3d 1330 (Table). The opinion of the district court (Pet. App. 3a-9a) is unreported.

JURISDICTION

The court of appeals entered its judgment on May 30, 1996. The petition for a writ of certiorari was filed on August 28, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (codified in various sections of 5 U.S.C.), established an integrated and comprehensive scheme of administrative and judicial review for federal employment disputes. The procedural remedies provided depend upon an employee's classification. Generally, the CSRA accords members of the competitive civil service and veterans and their close relatives more elaborate administrative and judicial review rights than employees in the "excepted service." See 5 U.S.C. 2102, 2103, 2108, 4303(e), 7511, 7513, 7703; see generally *United States* v. *Fausto*, 484 U.S. 439, 445-447 (1988).

Chapter 75 of the CSRA, 5 U.S.C. 7501 *et seq.*, governs adverse actions taken against federal employees. Subchapter II, 5 U.S.C. 7511-7514, addresses "major" adverse actions, such as removals. Subchapter II grants employees certain procedural rights, as well as a right to seek review of major adverse actions before the Merit Systems Protection Board and the Federal Circuit. 5 U.S.C. 7513, 7701, 7703. Nonpreference eligible members of the excepted service are not entitled to these procedural protections unless they have "completed 2 years of current continuous service." 5 U.S.C. 7511(a)(1)(C)(ii).

b. The Labor Management Relations chapter of the CSRA, 5 U.S.C. 7101 *et seq.*, gives federal employees the right to form unions and to negotiate collective bargaining agreements. Collective bargaining agreements must include negotiated grievance procedures, including binding arbitration. 5 U.S.C. 7121(a) and (b). Major adverse actions taken against employ-

ees within the CSRA must be subject either to grievance procedures or to the appellate procedures of 5 U.S.C. 7701 *et seq.*, which provide for review by the Merit Systems Protection Board. 5 U.S.C. 7121(e).

Adverse actions taken against employees covered by "other personnel systems" may be challenged "under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedures, but not both." 5 U.S.C. 7121(e).

c. In the Elementary and Secondary Education Act of 1965 (the Education Act), Pub. L. No. 89-10, Tit. I, §§ 2, 4(d)(2), 79 Stat. 27 (formerly codified at 20 U.S.C. 241), Congress authorized the establishment of federal schools for military dependents in areas where public education is inadequate. Congress repealed the Education Act on October 20, 1994. Pub. L. No. 103-382, Tit. III, § 331(b), 108 Stat. 3965.[1] The Education Act empowered the Secretary of Defense, in his discretion, to hire personnel "without regard to the Civil Service Act and rules." 20 U.S.C. 241(a)(2) (1988).

2. The Department of Defense Domestic and Elementary Schools (Department) is a component of the Department of Defense. In 1992, pursuant to the Education Act, the Department hired Judith Johnson as an art teacher at the Fort Stewart Dependent Schools. Pet. App. 4a. Her status was as a non-preference eligible, excepted service employee,

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[1] In 1994, Congress enacted a statute similar to the Education Act entitled the Domestic Dependent Elementary and Secondary Schools Act of 1994, Pub. L. No. 103-337, Div. A, Tit. III, § 351(a), 108 Stat. 2727. This Section also provides for free, comparable public education for military dependents. The language authorizing appointment of federal employees differs from the predecessor statute under which petitioner was appointed. See 10 U.S.C. 2164.

and her position was not within the competitive civil service. Gov't C.A. Br. 3. In September 1993, the Department terminated Johnson for cause because she had repeatedly failed her teacher certification test. *Ibid.*; Pet. App. 4a.

Petitioner is the certified bargaining representative for employees of the Fort Stewart Dependents Schools. Pet. App. 3a. Petitioner entered into a collective bargaining agreement with the Schools pursuant to the CSRA's Labor Management Relations chapter, 5 U.S.C. 7101 *et seq.* C.A. R.E. (Collective Bargaining Agreement at 20). Petitioner filed a grievance on behalf of Johnson challenging her termination. Pet. App. 4a. The arbitrator denied the grievance on the ground that Johnson was not entitled to arbitration. *Ibid.*

Petitioner filed suit seeking to compel arbitration. The district court dismissed for lack of jurisdiction. Pet. App. 9a. Because Johnson was not an "employee" within the meaning of Section 7511(a)(1)(C)(ii), the district court concluded that Johnson was not entitled to file a grievance or to invoke any statutory rights to arbitration under the CSRA. Pet. App. 7a-8a. The district court also held that the Education Act did not afford Johnson a statutory right to arbitrate her removal. *Id.* at 7a. Finally, the district court ruled that Johnson was not entitled to arbitration under Section 7121(e) because, even if she fell within an "other personnel system," the CSRA did not provide for judicial review of the arbitrator's decision.

The court of appeals summarily affirmed. Pet. App. 1a-2a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Furthermore, the statutory scheme under which Johnson was hired has been repealed, and the operative collective bargaining agreement is subject to renegotiation this year. Further review is therefore not warranted.

1. Petitioner contends (Pet. 12-16) that arbitration may be compelled because Johnson fell within an "other personnel system" rather than within the CSRA. The court of appeals correctly upheld the district court's decision that it lacked jurisdiction to compel arbitration for two reasons.

First, the Education Act did not create a distinct personnel system, within the meaning of 5 U.S.C. 7121(e). The Education Act gave general authority to the Department of Defense to provide comparable education for the dependents of service members; it did not establish a comprehensive framework for conditions of employment, hiring, pay, resolution of adverse personnel actions, or review procedures. See S. Rep. No. 969, 95th Cong., 2d Sess. 110 (1978); cf. *Nieuwdorp* v. *Library of Congress*, 872 F.2d 1000, 1002 (Fed. Cir. 1989) (Department of Defense Dependents Schools employees in Germany held not to be within an "other personnel system").[2]

Second, even assuming the Education Act created an "other personnel system," employees in "other personnel systems" may seek review of major adverse

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[2] Examples of such "other personnel systems" are the Veterans Administration Health Care Personnel system, 38 U.S.C. 7401 *et seq.*, and the Defense Department Overseas Teachers Pay and Personnel Practices Act, 20 U.S.C. 901 *et seq.*

actions only under either that personnel system's appellate procedures "if any" or the negotiated grievance procedure created by a collective bargaining agreement. 5 U.S.C. 7121(e). The Education Act created no right to arbitration and no "appellate procedures" authorizing review of adverse personnel actions in district court. *Department of the Treasury* v. *FLRA*, 873 F.2d 1467, 1472 (D.C. Cir. 1989) (other personnel system language of Section 7121(e) presumes that there may be no appellate procedures under a given personnel system), cert. denied, 493 U.S. 1055 (1990).

Furthermore, employees under "other personnel systems" who pursue relief under a negotiated grievance procedure, as Johnson did here, may only seek review of the arbitrator's decision under the "applicable appellate procedures," if any, established by the personnel system. 5 U.S.C. 7121(f). Because the Education Act does not authorize district court (or any federal court) review of arbitrator's decisions, the district court lacked jurisdiction over petitioner's complaint.

2. The CSRA also forecloses review of petitioner's claim. Only persons employed continuously for at least two years may invoke the CSRA's appellate procedures for reviewing major adverse actions. 5 U.S.C. 7511(a)(1)(C)(ii). Johnson had been employed for 13 months. Pet. App. 7a; Gov't C.A. Br. 3-4. Further, under the CSRA, review of an arbitrator's decision may be obtained only in the United States Court of Appeals for the Federal Circuit. 5 U.S.C. 7121(f), 7703; see also *Rogers* v. *Department of Defense Dependents Schools*, 814 F.2d 1549 (Fed. Cir. 1987).

3. Petitioner claims (Pet. 15-18) that the existence of a collective bargaining agreement allows it to seek review of the arbitrator's decision under the Administrative Procedure Act, 5 U.S.C. 702, the general federal question jurisdiction provision, 28 U.S.C. 1331, and the mandamus statute, 28 U.S.C. 1361. Congress, however, has established "an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *United States* v. *Fausto*, 484 U.S. 439, 445 (1988). At the same time, Congress outlined the procedures for review of arbitrators' decisions available to persons under "other personnel systems." 5 U.S.C. 7121(e) and (f). Allowing petitioner additional review of its negotiated grievance procedure outside Congress's established framework would (i) invert the preferred position of competitive service and preference eligible employees, who cannot have their arbitrations reviewed in federal district court, 5 U.S.C. 7121(e) and (f), 7703; (ii) undercut Congress's effort to create a centralized and uniform body of law governing federal employment relations; and (iii) accord unionized employees special opportunities for review of their employment grievances, while denying such protection to similarly situated employees who are not covered by a collective bargaining agreement. *Fausto*, 484 U.S. at 449-451; *McAuliffe* v. *Rice*, 966 F.2d 979, 981 (5th Cir. 1992) (employee of nonappropriated fund instrumentality of the Air Force may not seek review of termination under the Administrative Procedure Act because this "would perversely allow them more safeguards than Congress granted more-protected classes of ordinary federal

civil servants"); *Department of the Treasury* v. *FLRA*, 873 F.2d at 1472 (Congress provided "equal substantive protections against discipline or discharge for all federal employees in the same classification," which should not vary depending upon unionized or non-unionized status); *Royals* v. *Tisch*, 864 F.2d 1565, 1567-1568 (11th Cir. 1989). The court of appeals' decision was thus in accord with this Court's precedent and the decisions of other circuits. Furthermore, because the Education Act has been repealed, resolution of this question does not present a matter of continuing importance. Accordingly, further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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